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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, plaintiff in error,
v.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY.
No. 167.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a suit by the United States upon the official bond of the defendant Thomas C. MacMillan, as clerk of the district court of the United States for the Northern District of Illinois, and is brought against him and his surety, the Empire State Surety Company.

The declaration alleges that the said Thomas C. MacMillan did not faithfully discharge the duties of his office and properly account for all moneys coming into his hands as clerk of the said district court, in that, during the period between December 27, 1905, and January 27, 1910, while acting as

such clerk and under bond, as aforesaid, he failed to account for a sum of $3,861.05 which came into his hands in his official capacity as clerk.

As alleged in said declaration the moneys not accounted for "were derived from payments made to the said Thomas C. MacMillan for and on account of the interest on public moneys and moneys entrusted to said Thomas C. MacMillan, in his official capacity, as said clerk, to wit, (*a*) moneys paid to the clerk as fees under the bankruptcy laws of the United States, and (*b*) moneys paid to the clerk as his fees and compensation and as his emoluments as clerk under various statutes of the United States, and (*c*) moneys deposited with the clerk by various litigants in said district court under and by virtue of certain rules of said court." (Rec. 4.)

Defendants by their plea (describing therein the (*a*) moneys as "moneys paid to the clerk as *clerk's fee and compensation*, under the bankruptcy laws of the United States"), admit that the moneys set out in the declaration came into the possession and custody of MacMillan, and were deposited by him in various banks; and that on said moneys, so on deposit, the clerk received interest at the rate of 2 per cent, which constituted said sum of $3,861.05 mentioned in the declaration. (Rec. 9.)

The plea further sets forth that said clerk, during said period, on the first day of January and July of each year, or within 30 days thereafter, made a written return to the Attorney General of all fees and emoluments of his office; that each of said returns

included a statement of the necessary expenses of his office for the semiannual period, including necessary clerk hire (*and including his own compensation*), and was accompanied by vouchers for, and showing the payment of, the same; and that in each said return said necessary expenses so paid out were deducted from the entire amount of fees and emoluments received, and the surplus of money then remaining was immediately thereafter paid into the Treasury of the United States. (Rec. 10.)

As regards that portion of the (*c*) moneys—moneys deposited by litigants—consisting of fees and compensation payable to the marshal and other officers of the court, the plea alleges that the same was paid by the clerk to the officers entitled thereto as and when the same was earned; that the remainder of said (*c*) moneys, after payment of the fees and compensation of the clerk and other officers, as aforesaid, was paid out to the persons depositing the same, or their successors entitled thereto, under and by virtue of the rules of said court; and that, so far as that portion of said moneys consisting of clerk's fees, etc., is concerned, the same was included in and settled for in said semiannual returns. (Rec. 12.)

The plea does not allege that the clerk included in his returns to the Attorney General, or accounted for, or paid over to the United States, or any person entitled thereto, the $3,861.05 of interest accruing on said moneys and received by the clerk from the various banks in which the same were on deposit; and

the case was decided by the courts below on the theory that the clerk was not required by law to account to the Government for the interest so accruing.

To this plea the United States filed a demurrer, which was overruled by the district court, Judge Geiger presiding (Rec. 34–42; 209 Fed. 266); the United States, electing to stand on its demurrer, carried the case to the Circuit Court of Appeals for the Seventh Circuit, where the judgment was affirmed *per curiam* (Rec. 33–34). From said judgment the Government prosecutes this writ of error.

Specification of Error.

The Circuit Court of Appeals erred:

1. In not reversing the judgment of the United States District Court for the Northern District of Illinois.

2. In failing to take judicial notice of the fact that the said Thomas C. MacMillan, under the act of Congress of July 31, 1894 (28 Stat. 204), was an officer whose compensation was fixed by law, and that he was therefore prohibited by section 1765 of the Revised Statutes from receiving and retaining any part of the amount herein sued for.

3. In refusing to hold that the moneys included in the clerk's semiannual return on which said interest was collected and retained by the said clerk prior to being so included, did not belong to the said clerk and that he must account for the interest received thereon to the United States.

4. In not holding that all moneys entrusted to the said clerk by litigants and bankrupts, not included in his semiannual emolument returns, are trust funds for which the said clerk as bailee or trustee under said bond must account to the United States, including said moneys received thereon as interest and appropriated to his own use. (Rec. 26–27).

ARGUMENT.

I.

The clerk of the District Court for the Northern District of Illinois during the period involved was a salaried officer of the United States, expressly prohibited by law from receiving any additional pay, allowance, or compensation.

Defendants' plea, averring the clerk's disposition of funds received, after defining "necessary expenses," includes in parentheses the words "and including his own compensation, as allowed by law," and then allege that the surplus over and above such "necessary expenses" was accounted for and paid into the Treasury, thus giving the impression that the clerk, MacMlan, occupied the same relation to the United States as the clerks in other districts who derive their compensation from the earnings of their offices, and retained out of the fees and emoluments of his office, in addition to "necessary office expenses," his own compensation as allowed by law, and accounted to the Attorney General only for the balance remaining. The decision of the district court in this case proceeds on this theory. (Rec. 37–38.)

The statutes governing this particular clerkship show that such, however, is not the fact. Prior to 1894 this clerk, in common wtih all others, derived his compensation entirely from the earnings of his office. But during the period from 1894 until 1912, which includes the period involved in this suit, he was *sui generis* among the clerks of Federal Courts. Whereas other clerks accounted for their fees and emoluments less their necessary office expenses and the amount of their compensation, the clerk for this district accounted for all fees and emoluments less necessary expenses, and received his compensation by check drawn upon the Treasurer of the United States.

The act of July 31, 1894, making said clerk a salared officer, apparently was not called to the attenion of the district judge in this case or considered by him. It provides:

> The judge of the District Court fo the Northern District of Illinois shall be authorized to appoint a clerk of such court at an annual salary of three thousand dollars, which amount is hereby appropriated. (28 Stat. 204.)

The clerk for the Northern District of Illinois remained in this situation, appropriations for his salary being annually made, until July 1, 1912, when he was again placed on the same basis as other clerks. The Sundry Civil Appropriation Act for 1913 provides as follows:

> On and after July first, nineteen hundred and twelve, the clerk of the District Court for

the Northern District of Illinois shall be compensated for his services as such clerk as other clerks of United States district courts are compensated. (37 Stat. 417, 465.)

The above quoted language of the plea, if interpreted to mean that the clerk retained his compensation out of the fees and emoluments of his office, constitutes an allegation of fact impossible in law, of which the court will take judicial notice, and which is not admitted by the demurrer. *Louisville & Nashville R. Co.* v. *Palmes*, 109 U.S. 244; *Pearcy* v. *Stranahan*, 205 U. S. 257; *French* v. *Senate*, 146 Cal. 604, 69 L. R. A. 556; *Southern R. Co.* v. *Covenia*, 100 Ga. 46, 40 L. R. A. 253.

However, it is possible to give to the plea an interpretation which will obviate this objection, which is probably entirely consistent with the facts. The clerk may have retained his compensation out of funds on hand and endorsed his salary check over to the Treasurer of the United States along with the surplus of earnings over "necessary expenses;" in other words, he may have cashed his salary check out of his surplus funds on hand and used it as cash to settle his accounts.

As this construction comports with the statute, and the other contradicts it, the language of the plea must receive the interpretation consistent with the law.

In any event it is evident that by virtue of the Act of July 31, 1894, the said clerk during the period from 1905 to 1910 derived no part of his compensation

from the earnings of his office but was a salaried officer of the United States. As such he was clearly subject to the provisions of section 1765 of the Revised Statutes, limiting a public officer's compensation to that authorized by law. Said section provides:

> No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefore explicitly states that it is for such additional pay, extra allowance, or compensation. (Comp. Stat., sec. 3234.)

Of this statute, it was said by this court in *Hoyt* v. *United States*, 10 How. 108:

> It is impossible to misunderstand this language, or the purpose and intent of the enactment. It cuts up by the roots these claims by public officers for extra compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation. (P. 141.)

In the case of *Lewis* v. *United States*, 244 U. S. 134, it appears that Lewis was surveyor general of Louisi-

ana and was so appointed and commissioned on or about July 18, 1905, to that office, which he had previously held, and thereafter continuously held up until July 15, 1909. The act of Congress of March 3, 1831 (4 Stat. 492) provided, among other things, that:

> The surveyor general . . . shall be allowed an annual salary of two thousand dollars . . . and that the fees heretofore authorized by law for examining and recording surveys be, and the same are hereby, abolished . . . and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same.

The act of 1831, placing Lewis upon a salary basis, made no provision for the disposition of the fees which he was authorized and directed to collect. It had been the custom of Lewis and his predecessors in office to retain these fees as their personal compensation. This practice continued until May, 1907, after which the Commissioner of the General Land Office required that such fees be paid into the Treasury. Lewis sought to recover the fees for the period from May 1, 1907, to June 1, 1909, in addition to his salary.

The court said:

> We are of opinion that section 1765 of the Revised Statutes (Comp. Stat. 1916, sec. 3234), above quoted, prevents the allowance of the claim for fees. This section is general

> in its application, and fixes the compensation of officers of the United States at the salary established by law, unless the additional compensation is authorized and explicitly appropriated for. No such law or appropriation is shown in this case. (244 U. S. 146.)

This provision is, of course, equally applicable to an officer who receives a fixed compensation from the fees and emoluments of his office (*Hoyt* v. *United States*, 10 How. 108); and has been held to apply to a clerk of court who derived his compensation in this way (*United States* v. *King*, 147 U. S. 676). The case, therefore, is one of importance as applicable to all clerks of court. The fact that the defendant in the present case was on a salary basis, and derived no part of his compensation from the earnings of his office, emphasizes the applicability of the statute; is additional evidence of the purpose of Congress to limit his compensation to that authorized by law, and presents the question in its clearest form.

II.

The moneys included in the clerk's semiannual returns, on which interest was collected and retained, were received by defendant in his official capacity as clerk. He is, therefore, bound to account for the interest so collected as "emoluments" of his office.

The clerk upon being appointed under the act of July 31, 1894, ceased to have any ownership in or claim upon the fees or emoluments of his office for his personal compensation. He thereupon became obli-

gated to account to the United States for all such fees and emoluments over and above the "necessary expenses" of his office. Unless this case may be said to constitute an exception to the general rule that the interest follows the principal or corpus, the interest on such fees belongs to the United States, the sole owner of the corpus after deduction of said "necessary expenses."[1] *United States* v. *McMillan*, 165 U. S. 504; *United States* v. *Abeel*, 174 Fed. 12; *United States* v. *Mason*, 211 Fed. 233; affirmed C. C. A., Eighth Circuit, 219 Fed. 547; *Alexander* v. *United States*, 43 Ct. Clms. 389, 395.

It will be well, at the outset, to distinguish the cases of *United States* v. *Hill*, 120 U. S. 169, and *United States* v. *Mason*, 218 U. S. 517, relied on by the district court.

In the *Hill case*, after reviewing the statutes requiring clerks of court to account for all fees and emoluments over a fixed amount, the court held that the clerk of the District Court for Massachusetts was not bound to account for fees received in naturalization cases. The ground of decision was, that since the various clerks, with the acquiescence of the judges and of the executive branch of the Government, had uniformly omitted such fees from their returns, such long standing practice amounted to a

[1] The funds (principal) upon which the interest in question accrued may be summarized as (*a*) fees and the emoluments of the clerk for which the clerk was bound to account to the United States; and (*b*) moneys deposited by litigants with the clerk subject to be disbursed to himself or others as provided by law, or the judgment of the court. The question as to the interest accruing on the (*b*) moneys will be considered under the next succeeding head. (*Infra*, p. 18.)

contemporaneous construction of the statute requiring such returns, which the court would not overturn. By an amendment to the statute in question, dated June 28, 1902 (32 Stat. 475; Comp. Stat. sec. 1398), it was provided that the word "emoluments," as used therein, "shall be understood as including . . . all amounts received for services in naturalization proceedings . . . and all other amounts received for services in any way connected with the clerk's office." This provision, it has been held, was enacted "with an evident intent to nullify" the decision in the above case. *United States* v. *Oliphant*, 230 Fed. 1, 7–8; *Alexander* v. *United States*, 43 Ct. Clms. 389, 396.

The *Mason Case* involved an indictment against the clerk of the District Court in Massachusetts for alleged embezzlement of the fees and emoluments of his office prior to including them in his return. The court, following the *Hill Case*, held that the statutes limiting a clerk's compensation to a fixed amount had not changed the relation of the clerk to the fees and emoluments collected by him; and that such fees and emoluments, while in the hands of the clerk and unaccounted for, were not, strictly speaking, the property of the United States, but a fund from which the clerk receives his compensation and expenses, and as to the remainder of which he must account to the United States, not as trustee, but debtor. Accordingly, the court upheld the judgment of the lower court in sustaining a demurrer to the indictment, but in so doing was careful to observe:

> We have not before us a case where a clerk has refused or failed to make the return required by statute or to pay over the surplus shown by his return to exist. (218 U. S. 530.)

The obligation of the clerk to account for the principal or corpus being clear, what reason exists for contending that he is not also bound to account for the interest accrued thereon? The logical view would seem to be that such interest constitutes an "emolument" of his office for which he should account along with the other fees and emoluments. While, apparently, there is no Federal decision holding such interest to be an emolument, the term would seem to be broad enough to include it, particularly in view of the statutory definition given the term in the abovementioned act of June 28, 1902, *supra*, p. 12.[1]

The meaning of the term "emolument" was under consideration by this court in the case of *Hoyt* v. *United States*, 10 How. 109, 135. The court said:

> The provision in this act, therefore, that whenever the annual emoluments, after dededucting the expenses, exceeded the amount of five thousand dollars, the excess should be accounted for, necessarily embraces in the limitation the fees as well as commissions belonging to the office, and would have embraced also the fines and forfeitures, had it

[1] The opinion of the Comptroller of the Treasury, cited in the memorandum of the Circuit Court of Appeals (Rec. 34) was based upon the opinion of the district judge in the present case, and is not, therefore, an independent opinion. XXIII Comp. Dec. 732.

> not been for the proviso to the act taking them out of the limitation.
>
> The argument would be quite as strong in favor of excluding the commissions as in the case of fees, as the one can in no more appropriate sense be regarded as emoluments of office than the other, and thus the limitation would become a nullity.
>
> These terms denote a compensation for a particular kind of service to be performed by the officer, and are distinguishable from each other, and are so used and understood by Congress in the several compensation acts; they are also distinguishable from the term *emoluments*, that being more comprehensive, and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office; and such is the obvious import of it in these acts.

The word "emolument" also is defined in the case of *Vansant* v. *State*, 96 Md. 110, 128, as follows:

> So "emolument" is said in *Apple* v. *Crawford County*, 105 Pa. St. 303, to import "any perquisite, advantage, profit, or gain arising from the possession of an office," and, as we have have seen, the clerk is expressly required to account for "emoluments."

The subject was very carefully considered by the Court of Appeals of Maryland in the case of *Vansant* v. *State, supra*, in which it was expressly held that a clerk should account for interest on moneys deposited by him as "emoluments." Vansant was clerk of the court in the city of Baltimore and retained

interest at the rate of 2 per cent on funds collected by him for the use of the State and deposited by him in bank. The court said:

> Independent of any authorities on the subject, there would seem therefore to be but little room to question the liability of the clerk for interest received by him on funds collected by him for the use of the State and deposited in bank. It would be a most dangerous practice to sanction, to permit him to retain such interest, and if the law were otherwise than what we determine it to be, the safety of the public money would demand additional legislation on the subject. If a clerk can deposit money in bank and receive one or two *per centum* interest on it for its own use, what would hinder him from lending it to individuals or other corporations at a higher rate of interest? * * * The temptation to get higher interest is illustrated in this case, where it is shown that the bank which paid one *per centum* had an insignificant portion of these funds, as compared with those which paid two *per centum*. Then, too, the position taken by the appellants would be a great inducement to postpone the payment of the public moneys to the State as long as possible. Clerks are required by the Statute to pay over what they have received on the first Mondays in March, June, September, and December, and this record shows that this clerk did not pay over these large amounts until the end of June, and he was getting interest on them for nearly a month after they were payable by the

very terms of the Statute. It is true that the Statute only provides for the penalties if the public money is not paid within thirty days after the dates named, but it was payable to the State on those days, and especially in June, when the bulk of the license money is to be accounted for it should be paid promptly and there should be no such inducement to postpone payment as there would be if clerks and other officers are permitted to profit by keeping the money in bank thirty days after it was payable. (Pp. 128–129.)

* * * * *

2. Having decided that the clerk is responsible, is the surety on his bond liable for the interest thus received by him?

We are of the opinion that it is. From what we have said, it will be seen that we deem this interest to be an "emolument" of the office. (P. 130.)

The principle that the interest on funds of this character belongs to the State, and that clerks of court should not receive any compensation above the maximum fixed by the statutes, is adhered to in the case of *Hughes* v. *The People*, 82 Ill. 78, in which a sheriff of a county received money as commissions on tax money deposited by him in bank, and retained same in addition to the compensation allowed him. The court, in considering this case in its opinion, at page 80 says:

It follows, therefore, when the county court of St. Clair County fixed the compensation of appellant at three thousand dollars

per annum, and two thousand and five hundred dollars additional for clerk hire, to the total of these amounts was appellant entitled. He could claim nothing beyond them, and all sums beyond that total were payable into the treasury of the county.

It appears appellant received from a banking institution the sum of twenty-five hundred dollars as compensation for the deposits he made therein of moneys which came to his hands as sheriff, and it is claimed by him he is not accountable for this sum to the county.

The money was received by him as a perquisite or emolument of his office as sheriff—this is not questioned. The statute on this subject leaves the point free from doubt. Section 52 of the act of 1872, title "Fees and salaries," provides as follows: "All fees, perquisites, and emoluments received by said county officers, above the amount of compensation fixed by the county board, and clerk hire and other necessary expenses, shall be paid into the county treasury." R. S., 1874, p. 522, chap. 53.

This being a perquisite or emolument acquired by official position, should be accounted for to the county. (P. 80.)

The Supreme Court of the State of Indiana, in the case of *Hunt et al.* v. *The State*, 124 Ind. 306, 308, wherein the city treasurer loaned funds of the city and collected interest thereon and failed to account for same, said:

He could not make a loan of city funds in his official capacity which would enure to his

> individual benefit; his official acts belonged to the city of which he was an officer, and whatever benefits were derived therefrom enured to the city. The money sued for being money coming into his hands in his official capacity, the appellant and his sureties are liable on their bond therefor.

These authorities establish the duty and obligation of the clerk to account for and pay over to the United States all moneys received by him as fees and emoluments of his office, including all interest received thereon. To the same effect are *Rhea* v. *Brewster*, *infra* p. 20, and the cases therein cited.

III.

The United States, as obligee on the clerk's bond, may maintain a suit against the clerk and his surety for failure to account for interest collected and retained on moneys deposited by litigants subject to disbursement.

The trust funds here included on which interest was retained by the clerk were those received by the clerk as fees of the referees and trustees under the bankruptcy law,[1] together with certain moneys be-

[1] While in our view of the case the point is not important, we deem it our duty to call attention to the fact that the declaration alleged that the interest accrued, among others, on "(*a*) moneys paid to the clerk as fees under the bankruptcy laws of the United States," which allegation included not merely the $10 clerk's fees in such cases but also the fees of referees and trustees as provided for by the bankruptcy law (Act of February 5, 1903, 32 Stat. 799; Comp. Stat., secs. 9624 and 9632); and that the plea, while professing to respond to the entire declaration, described said (*a*) moneys as "moneys paid to the clerk as *clerk's fee and compensation under the bankruptcy laws of the United States*" (*supra*, p. 2).

"It is a settled rule in pleading that wherever a plea in its commencement professes to respond to the entire declaration or count, and is in substance and reality an answer to part only of such declaration or count, the plea is bad, and the defect may be availed of, upon demurrer." *Hogan* v. *Ross*, 13 How. 173, 181–182.

longing to divers litigants who had deposited the same with the clerk to secure the payment of court costs, witness fees and other expenses, and continued to be the property of the referees, trustees and litigants in the possession of the clerk until they were used for the payment of court costs, witness fees and other expenses, or were subsequently returned by the clerk to the litigants. If these deposits remained unclaimed by the persons entitled thereto for a period of five years they then become subject to an order of court to cause the same to be deposited in the Treasury of the United States. (Secs. 995 and 996, Revised Statutes as amended; Comp. Stat., secs. 1644 and 1645; *In re moneys, etc.*, 170 Fed. 470, and *United States* v. *Abeel*, 174 U. S. 12, 20–21.)

It is no defense to say that the interest accruing on these funds does not belong to the United States. The requirement of the statute is not simply that clerks shall account for all moneys belonging to the Government, but that they shall also report and account for "all other amounts received for services in any way connected with the clerk's office" (act of June 28, 1902, *supra* p. 12), and "for any other moneys received by them in their official capacity, whether on behalf of the United States or otherwise" (act of June 30, 1906, 34 Stat. 754, Comp. Stat. sec. 1399). But apart from the question of the ownership of the funds and the interest arising thereon, and the duty of the clerk to account therefor, it is submitted that

the United States may maintain this suit as obligee on the clerk's bond.

The opposite contention overlooks the nature of the proceeding. It is not the purpose of this suit to establish, as between the litigants depositing the funds and the Government, the ownership of the interest arising thereon. This is a suit by the United States upon the official bond of the clerk, which provides that he "shall faithfully discharge the duties of his office . . . and properly account for all moneys coming into his hands as required by law." (Rec. 3.) It suffices for the maintenance of this suit to say, as in the declaration it is specifically alleged, that the interest in question "is and was no part of any sum or sums earned by him, the said Thomas C. MacMillan, as such clerk." (Rec. 4.) Compare *United States* v. *Davis*, 243 U. S. 570, 572.

It is not disputed that the principal on which the interest in question accrued was the property of the litigants depositing the same, nor could it be. *Howard* v. *United States*, 184 U. S. 676; *United States* v. *Abeel*, 174 Fed. 12. What reason, then, exists for saying that the interest is not also the property of the litigants? The case of *Rhea* v. *Brewster*, 130 Iowa 729, is directly in point. This was a suit wherein the clerk retained, as his own, interest on money intrusted to him in his official capacity. The court said:

> The money came into his hands by virtue of his office, and, though as a tender in a case,

became the property of the plaintiff upon the specific performance of the contract to purchase in accordance with the decree of the district court, affirmed by this court, and his title thereto related back to the time of such tender. That the clerk was liable for the money tendered is not questioned. . . . We think he is liable for any increase or increment thereon. Section 296 of the code provides what fees shall be collected by the clerk of the court, and section 297 fixes his compensation. That duties may be required of him for which no compensation is provided, does not authorize the allowance or exaction of additional compensation. . . . In undertaking to discharge the duties of the office he necessarily assumed, with the honors of the and emoluments, the burdens also. The money did not become the property of the clerk. It was merely deposited with him as custodian for the benefit of the party to the suit who might be adjudged entitled thereto. . . . (P. 731.)

The true test, as it seems to us, is not whether he is absolutely liable to account, but whether he is the owner of the funds in his hands. If he is not such owner, and the moneys coming into his hands belong to the county or some one else, any increment thereto is and should be treated as a part of the principal. This is the view approved in the better considered cases, and the only one consonant with sound public policy. (Citing *Board of Supervisors* v. *Wandel*, 6 Lans. (N. Y.) 33; *Eshelby* v. *Board of Education*, 66 Ohio

71; *State* v. *McFetridge*, 84 Wis. 473.) (Pp. 733–734.)

Since the clerk was not the owner of the interest, and since indisputably the same came into his hands in his official capacity as clerk, there can be no question as to the right of the United States to maintain this suit. In *Howard* v. *United States*, 184 U. S. 676, a clerk of court was sued on his official bond for an accounting of a sum of $2,525 deposited with him by a defendant in a civil case as a tender of money to a plaintiff. Mr. Justice Harlan in his opinion said:

> It must be taken as indisputable that the money in question was paid by Henry County in satisfaction of Stewart's claim or cause of action. It must also be taken as indisputable, upon this record, that the deposit was made with Watson as clerk in the presence and with the assent of the court, although no order was entered expressly requiring the money to be paid to the clerk, or expressly directing him to receive it. But all this is necessarily to be implied from the terms of the order of March 3, 1891, which states that Henry County—presumably in the presence of the court—*deposited the money with the clerk*. It would be a very narrow interpretation of the words of that order to hold that the money was paid to Watson without the knowledge, approval or sanction of the court, or that it was paid to him as an individual and not in his capacity as clerk. . . .
>
> He was allowed by statute a commission "for *receiving*, keeping and paying out money

in pursuance of any statute or order of court." Rev. Stat., sec. 828. It was well said by Judge Caldwell, delivering the unanimous judgment of the Circuit Court of Appeals, that *"for more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and ordinary manner, and during that time neither the clerk nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such clerks."* (P. 682.) [Italics ours.]

The question of the liability of a clerk of a district court on his bond for moneys deposited by litigants as security for court costs in civil actions, and the right of the United States to maintain a suit for same, was determined in the case of *United States* v. *Abeel* (C. C. A. Fifth), 174 Fed. 12. The defense in that case, as set forth by the court in its opinion on page 18, was the same as in the case at bar, for the court says:

> The defense sustained by the court below is based on the proposition that the United States has no such interest in the fund as will sustain the suit.
>
> These sums were paid to Finks, not as an individual, but as clerk of the court. The parties who made the deposits were required to do so by rules of the court. Except as to the part of the sums necessary to pay his own costs, the clerk held the money officially, to be paid out to those entitled to it. His

possession of it never gave him any personal right to it, and he violated his official duty when he converted it to his own use. Holding the money as clerk, he held it subject to the orders of the court, and any witness or officer entitled to part of it, on motion and on proving the facts, could have obtained an order on the clerk to pay him the amount due him. If, when he ceased to be clerk, the deposits were in his custody, he had no right to longer hold them. If he could not immediately disburse the money to those entitled to it, he should have left it on deposit, subject to the order of the court, or turned it over to his successor in office. If it had been shown to the court that a retiring clerk had funds in his hands held by him officially, an order would have been made, if necessary, directing the fund to be turned over to his successor, or otherwise placed under the control of the court.

And the court continued (p. 19):

Unquestionably one entitled to a part of the funds in the hands of the clerk could sustain a suit on the clerk's bond in the name of the United States. *Howard* v. *United States*, *supra*. But it by no means follows that on the facts stated in the petition a suit for the breach can not be maintained by the United States without a statement that the suit is for the use of some one named in the petition. In *Boston & El. Ry. Co.* v. *Grace & Hyde Co. et al.*, 112 Fed. 279, 284, 50 C. C. A. 239, 244,

the court, referring to the phrase in a declaration, "for the use and benefit" of another, said:

"According to respectable authority, the expression of a use may be disregarded as surplusage. Its purpose is to guard the interest of the usee against the adverse action of a nominal plaintiff. It is held that such a phrase has no force to make an issue different from what it would have been if the phrase had been left out. It is held, also, that the declaration of use is no part of the pleading. *Bentley* v. *Insurance Co.*, 40 W. Va. 729, 739, 23 S. E. 584; *Belton* v. *Gibbin*, 12 N. J. Law, 77; *State* v. *Johnson*, 52 Ind. 197; *Clay Fire & Marine Ins. Co.* v. *Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346, 355; *Northrop* v. *McGee*, 20 Ill. App. 108; *Tedrick* v. *Wells*, 152 Ill. 214, 217, 38 N. E. 625; *Hobson* v. *McCambridge*, 130 Ill. 367, 375, 22 N. E. 823; 15 Enc. Pl. & Prac. 484, 498."

See, also, 31 Cyc. 100, and cases there cited, and *United States* v. *Griswold*, 8 Ariz. 453, 76 Pac. 596; Id., 9 Ariz. 304, 80 Pac. 317.

And generally as to the right to maintain a suit in the name of the plaintiff having the legal cause of action without mentioning the usee, see *Mobile & Montgomery R. Co.* v. *Jurey*, 111 U. S. 584, 593–595; *Webb* v. *Southern Ry. Co.*, 235 Fed. 578, 585–588; *Southern Ry. Co.* v. *Blunt & Ward*, 165 Fed. 258, 261; *Long* v. *Kansas City & Ry. Co.*, 170 Ala. 635, 642.

Indeed this proposition was expressly recognized by the district court in the present case. The court held, however, that since in its view of the case the

clerk was entitled to retain the interest, the principle had no application. The court said:

> Of course when a clerk has breached his obligation with respect to holding and properly disbursing moneys deposited by litigants, the power of the Government as obligee in the bond given by the clerk, to sue on behalf of and vindicate the litigant's rights, can not be denied. (Rec. 42; 209 Fed. 273).

As regards the suggestion in the opinion of the District Court that the clerk is an insurer of private funds deposited with him, and as such is entitled to retain as compensation the interest accruing thereon (Rec. p. 38), see *Rhea* v. *Brewster, supra; State* v. *McFetridge,* 84 Wis. 473; *Eshelby* v. *Board of Education,* 66 Ohio 71; *Garley* v. *People,* 28 Colo. 227 (Syl. 2); *Nash* v. *Faulkner,* 107 N. Y. 477.

CONCLUSION.

It is respectfully insisted that the judgment of the Circuit Court of Appeals was erroneous and should be reversed.

November, 1919.

ALEX. C. KING,
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A. F. MYERS,
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O

Supreme Court, U. S.
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No. 167

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

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WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Because the statement of the case contained in the brief of plaintiff in error appears to us to be inadequate, we beg to supplement that statement as follows:

In the District Court of the United States for the Eastern Division of the Northern District of Illinois, there were begun in 1911 nine suits, all being actions in debt against the clerks of the various federal courts and their bondsmen. Amended declarations were later filed in each case. To these amended declarations, pleas

were filed and the government filed general demurrers to the pleas. In 1913 the demurrers in all of the cases were argued together and one opinion was filed by Judge Geiger on November 8, 1913, overruling the demurrers and sustaining the pleas, and the United States, electing to stand by its demurrers, judgments were rendered in favor of the defendants in each of the nine cases. (See Judge Geiger's opinion, Rec., 34-42; reported in 209 Fed. Reporter, 266.)

The declarations in the nine cases were alike except as to the amounts claimed and the parties defendant in the different suits. The pleas in the nine cases were also alike except in the same particulars. The declaration in the case at bar alleged a breach of Clerk MacMillan's official bond, consisting of a failure to account and pay over to the United States three thousand eight hundred sixty-one dollars and five cents ($3,861.05) alleged to have been derived from payments made to MacMillan for and on account of interest on *public moneys* entrusted to him in his official capacity as clerk, to wit:

(a) Moneys paid to the clerk as fees under the Bankruptcy Laws of the United States; and

(b) Moneys paid to the clerk as his fees and compensation and as his emoluments as clerk under the various statutes of the United States; and

(c) Moneys deposited with the clerk by various litigants in said District Court under and by virtue of certain rules of said court.

The aggregate sum of interest moneys, default in whose payment to the government is so averred is further characterized as having been "paid to him (the clerk) for the use of the said moneys collected and held by him as clerk as aforesaid under the laws of the United States," etc., and "the same is and was no part

of any sum or sums earned by him * * * (the clerk) as such clerk, but was in fact and is the property of the United States." The plea interposed to this declaration set up:

That there came into the possession and custody of the defendant clerk, and was deposited by him in various banks while he was in such custody and possession, certain moneys, referred to as the aggregate principal, composed of, and coming from various sources, viz.:

(a) Moneys paid to the clerk as clerk's fees and compensation, under the bankruptcy laws of the United States; and

(b) Moneys paid to the clerk as his fees, and compensation, and as his emoluments as clerk, under various other statutes of the United States; and

(c) Moneys deposited with the clerk by various litigants in said District Court, under and by virtue of certain rules of said court, hereinafter referred to.

That on the average balances of said "aggregate principal" so remaining from day to day on deposit, the clerk received interest at the rate of two (2) per cent, said interest so received being the said * * * (sum) mentioned in the declaration, and no other.

That as to the money included in items "a" and "b" and in that portion of item "c" which was, after its deposit, paid to the clerk as clerk's fees, emoluments or compensation as hereinafter mentioned (and which portion is hereinafter for convenience referred to as fund "d"), the clerk did on the first days of January and July of each year, or within thirty days thereafter, during all the time mentioned in the declaration, and in all respects as provided by statute, make a written return to the Attorney General of the United States, on a form prescribed by the latter, for and covering the next preceding semi-annual period, of all the fees and

emoluments of his said office as clerk of said District Court, and included in the same all of the moneys composing said items "a" and "b" and that portion of item "c" paid to the clerk as fund "d."

That each of said returns included also a statement of the necessary expenses of said office during the same respective semi-annual period, including necessary clerk hire (and including his own compensation as allowed by law) and was accompanied by vouchers, for, and showing the payment of the same; that each said return particularly stated the amounts for the respective preceding half year, of all fees and emoluments received, and of all said necessary expenses paid out, which expenses were deducted on said statement from the entire amount of all said fees and emoluments received; that the surplus money then remaining, and thus shown, was in each said half year period, and immediately after said return was made, to wit: on the same day, paid into the Treasury of the United States, or to the Subtreasurer of the United States, as was then directed by the Attorney General, and said surplus thus shown and accounted for and paid, was in each case received by the United States.

And the said interest received by the clerk in each semi-annual period earned and accrued as aforesaid upon said items "a" and "b," and upon that portion of item "c" above mentioned as fund "d" was so earned and accrued before, and not after, the said fees and emoluments composing the said items, had been so included in, and made the subject of said return, and had formed the basis of the computation and ascertainment of said surplus.

The plea further set out the court rules, which provide for the deposit by plaintiffs with the clerk, of the sum of twenty-five dollars, to be applied to the payment

of accruing costs; for the deposit by defendants appearing separately, of the sum of five dollars for the payment of defendants' costs that may accrue; for the receipt by the clerk of moneys paid to be applied on judgments, subject to the clerk's right to take one per cent thereof as earnings of the office; for the accounting of interest on such latter sums upon motion of a party—no such interest to be accounted for without the order of the court; for the repayment to original depositors of unexpended balances remaining in the clerk's hands after expiration of a specified time. The plea then averred:

That said item "c" was composed entirely of money paid to the clerk by litigants in said court, under and by virtue of said court rules above mentioned, and for the purpose of being disbursed by the clerk.

To himself as fees or compensation allowed by law; and to the marshal and other court officers as their respective fees or compensation allowed by law; and to other persons, and for other purposes, connected with litigation, as the same should be from time to time by said court directed.

That all of the fees and emoluments, earned by the clerk, and to which he became entitled, to be paid and which he was paid out of said item "c," were by him included in and specified in his said respective semi-annual returns and reports as aforesaid.

That that portion of the money composing said item "c" which was composed of said fees and compensation of the marshal, and other court officers, and said sums directed by the court to be paid to others, was all, by the clerk, paid to those court officers entitled to the same, as, and when the same was by such officer earned, or was paid to such other person when and as the court directed the same to be paid to them, as the case might

be, said portion being herein called and referred to as fund "e."

That the money composing the residue of said item "c," other than fund "d" and fund "e," was by the clerk paid out to the persons depositing the same, or to their successors entitled thereto, under and by virtue of said court rule, as and when the same was and became payable.

That of the said sum of money composing item "c" that portion earned by, and paid to, the clerk as fees and emoluments earned by him as clerk (being fund "d") was in each case included in, and settled for, in the respective semi-annual returns as aforesaid.

One of the nine cases (not the case at bar but differing from it only in the amount involved and the parties made defendant as sureties on the clerk's bond) was brought into the Circuit Court of Appeals for the Seventh Circuit on a writ of error by the United States and submitted to that court on printed briefs and oral argument at its April term, A. D. 1917, and was there numbered and known as Case No. 2180. Pending the consideration of that case by the Court of Appeals, the case at bar was brought into the Court of Appeals on writ of error by the United States and there numbered and known as Case No. 2181. At its October term, A. D. 1917, the Court of Appeals handed down an opinion in Case No. 2180 affirming the judgment of the District Court. (Rec., 33 and 34.)

Afterward at the April term, A. D. 1918, of the Circuit Court of Appeals, the case at bar was submitted in that court on printed briefs and oral argument and that court then affirmed the judgment of the District Court on the authority of its opinion in Case No. 2180 (Rec., 24) and it is from this last judgment of affirmance that this writ of error is prosecuted.

BRIEF OF ARGUMENT.

I.

The plaintiff in error now raises the point that the status of the clerk of the District Court for the Northern District of Illinois during the time involved in this suit was different from that of the clerks of the other United States courts, in that the clerk of the District Court for the Northern District of Illinois was a salaried officer of the United States deriving no part of his compensation from the earnings of his office and was not authorized by law to retain out of the fees and emoluments of his office, in addition to necessary office expenses, clerk hire, etc., his own compensation as allowed by law and account to the Attorney General for the balance remaining only.

The plaintiff in error is not in position to raise this point at this time. The pleas of Clerk MacMillan in this case, as well as the first case taken to the Court of Ap-

peals and there known as No. 2180, in referring to his semi-annual return to the Attorney General, averred

> "That each of said returns included also a statement of the necessary expenses of said office during the same semi-annual period, including necessary clerk hire (and including his own compensation as allowed by law) and was accompanied by vouchers for and showing the payment of the same."

General demurrers were filed by the United States to these pleas. Upon argument of these demurrers before the District Court no point was raised by the United States that the status of this clerk was different from the status of clerks of the other United States courts nor was it contended that this clerk did not have a right to and did not actually retain out of the fees and emoluments of his office his own compensation as well as clerk hire, office expenses, etc., and account to the Attorney General for the balance remaining only, but the cases were argued and submitted in the District Court absolutely and solely upon the theory of facts alleged in the plea.

We submit that the plaintiff in error, having failed to raise this point in the District Court when the nine cases were there argued, submitted and considered, is not in position and should not be allowed to do so now. See *Campbell* v. *U. S.*, 224 U. S., 99, 106; *Luria* v. *U. S.*, 231 U. S., 9, 17; *Gila Valley Railway Company* v. *Hall*, 232 U. S., 94, 98, 99; *Bank of Arizona* v. *Haverty*,

232 U. S., 106, 110; *Magruder* v. *Drury*, 235 U. S., 106, 113; *West* v. *Rutledge Timber Company*, 244 U. S., 90, 100.

Aside from the foregoing considerations, however, the question whether the clerk was a salaried officer and received his compensation direct from the government or whether he retained his compensation from the fees and emoluments of his office would have no bearing upon the legal principle governing this case. In either case the clerk is required to make his semi-annual return on the first days of January and July of each year to the Attorney General. The fact that a clerk may be salaried does not require that deposits made with him for costs shall be by him paid into the Treasury prior to such semi-annual return and audit. In other words, his relation to such deposits would be precisely the same in either case. If he was a salaried officer and received his compensation from the government during the time, as now contended by the plaintiff in error, he still is authorized and required by law to pay his office expenses and necessary clerk hire out of the fees and emoluments of his office and to account for the balance remaining on hand at the end of the six-month period only. Before such accounting he would be directly and personally interested in these fees and emoluments up to an amount which would reimburse him for his clerk hire and office expenses, since if that amount were not received the deficit would become a personal charge upon him.

It is obvious, therefore, that even though the clerk may not during the time covered by this suit, have retained his compensation from the fees and emoluments of his office (which is contrary to the government's admission of record and a point it cannot now raise) still

that is not controlling upon the real question involved in this case. The question involved in this case is whether the funds received by the clerk were *public moneys* of the United States before a surplus of moneys in his hands as clerk was ascertained and required to be paid over by his account and return. This court has already held that before such accounting is made and before such surplus is established, the government has no interest whatever in the money in the clerk's hands—*U. S.* v. *Mason*, 218 U. S., 517. This case, it seems to us, is decisive of the case at bar. The District Court for the Northern District of Illinois, in deciding the case at bar followed the Mason case and held that the ruling in the Mason case was conclusive in the case at bar. (Rec., 39.)

In the case of *Lewis* v. *U. S.*, 244 U. S., 134, cited by plaintiff in error in its brief, the controversy arose over certain fees paid to the incumbent of the office of Surveyor General for copies of plats of survey and transcripts of records of said office, the fees to be charged therefor having been previously fixed by the same Act of Congress which fixed the Surveyor General's salary at $2,000 per annum. In that case the United States contended that allowance to the claimant of these fees (being moneys paid into that office for copies of plats of survey and transcripts of records) was prohibited by Section 1765 of the Revised Statutes of the United States.

The claimant contended that Section 1765 of the Revised Statutes did not interfere with collection of these fees, because Section 1765 only prohibited compensation additional to "salary, pay or emoluments * * * fixed by law or regulations" and that under a previous statute these fees were emoluments already fixed by law.

This court held that Section 1765 of the Revised Statutes

prevented the allowance of the claim for the fees. We fail to see wherein that case is in point here, the fees in that case being clearly *public moneys,* as distinguished from fees of a clerk's office held by this court in the Mason case not to be *public* moneys until *after accounting* and *surplus established.*

Furthermore, it does not appear from that case or the Acts of Congress therein cited that the Surveyor General is, or was authorized and required to pay out of the fees which were the subject of controversy, necessary clerk hire, office expenses, etc., and account for balance only as clerks of the United States courts are. It clearly appears, therefore, that the Lewis case is of no binding force as an authority on the proposition involved in the case at bar. The declaration in this suit was bottomed on the flat premise that the moneys, at the time they reached the clerk's hands and upon which the interest was earned, were *public moneys;* that is, they belonged to the public at the time they earned the interest.

If the proposition is established as a fundamental fact that the money before accounting is public money, then, of course, the interest follows the principal and the government is entitled to it, but in this case the exact reverse is true and was so held by this court in the Mason case.

II.

Under this section of its brief the United States contends that the interest collected by the clerk was an emolument of his office and that he should account for the same. In answer to this contention we quote from Judge Geiger's opinion as follows:

"This language, it seems to me, leaves nothing

further to be considered except the suggestion made by plaintiff that the interest moneys, being received upon funds which came to and were in the clerk's hands by virtue of his office, should be considered and accounted for as *emoluments*. What test is afforded in determining whether a sum of money received by an official is an emolument of his office? Certainly this—that the official do some act or perform some service pursuant to the obligation or sanction of his office to or for the benefit of the one paying the money charged to be an emolument; that the one paying the money has the right to exact from the official the rendition of the service, and the official has the right to exact the money return—under official obligation or sanction of the particular office to which the emolument is claimed to attach. To put it in another way—the payment moves to the official in consideration of the rendition by him of some official act or service, the official does the act or renders the service by virtue of his office. The official character of the act is his warrant for exacting the payment.

Now, while it is true that the incumbency of the office of clerk by an individual, his receipt of moneys for fees, emoluments or deposits by litigants, and the deposit thereof by the clerk in banks, all concur in furnishing or creating the occasion through which he receives interest on the funds in the bank, yet he is not required, therefore cannot and does not deposit the funds in the bank upon an interest paying basis by virtue of his official obligation; nor can or does he exact the interest from the banks under the sanction of official right or duty. *Therefore such interest is not and cannot be an emolument.*

In this connection it is further urged by the Government that, until the semi-annual return is made, the moneys received by the clerk for fees, court costs, etc., belong 'to the office of the clerk and not his individual property.' It is not possible that the 'office' of clerk can be treated as an entity, apart from the Government or the clerk, having a proprietary interest or title in or to the funds. If

the contention be that because the moneys are paid to and received by the clerk by virtue of his office and not individually, therefore they are not his individual property, the reply is aptly stated by Mr. Justice Hughes in the Mason case:

'There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. The consideration however does not aid the prosecution for they were attached to the office before the Statute of 1841, when they belonged to the clerk without any duty to account for them.'

This last observation suggests the query if, prior to the passage of these statutes, the clerk had deposited in the bank all moneys received by him as clerk and had received interest on his daily credit balance, could it reasonably be claimed that such interest money was an emolument of his office? It is my judgment that whatever effect these various statutes may have, they do not have the effect of transforming into fees and emoluments, payments which, prior to their passage, were not fees and emoluments received for the discharge of official duties. They furnish no new tests for determining the character of funds received by the clerk. Nothing demonstrates this more clearly than *United States* v. *Hill, supra,* and the amendment to the statute which ensued the rendition of that decision. There, a clerk of the district court by direction of the judge, rendered services by way of assistance in naturalization proceedings—the preparation of cases for hearing, examination of witnesses and the like, for which he collected compensation from the applicants. It was sought to compel him to account for the moneys thus received; but as the duties were held not to pertain to the office of clerk, he was held not obliged to include them in his return. The law as subsequently enacted by Congress declared such compensation subject to be accounted for as other

fees and emoluments—doubtless to avoid the effect of the ruling referred to.

The conclusion to be drawn from the Mason case would therefore appear to be: That the statutes which have been passed since 1841 do not abolish, but on the contrary were and are intended fully to recognize and continue in force the pre-existing system of compensating clerks of courts by means of fees and emoluments collected from persons who as litigants or otherwise are recipients of their official services; that the fundamental purpose of these statutes is (1) to place a limitation upon the aggregate amount of compensation which may be received by clerks through such system; (2) to impose upon the clerks the obligation to pay to the Governments—of which they are officials—the excess beyond such limitation; (3) to provide the manner and means, semi-annually, of reducing such obligation to concrete terms, by requiring returns, accounting and the like, and (4) the manner and means of securing performance by the clerks of the statutory obligation to pay the excess, if and when ascertained. This conclusion, and no other, is reconcilable with the Supreme Court's view that the clerk is not a trustee but a debtor, of the Government." (Rec., 40, 41 and 42.)

The Circuit Court of Appeals, in affirming Judge Geiger must necessarily have approved this reasoning. (See Opinion C. C. A., Rec., 33 and 34.) The Comptroller of the Treasury has also held that interest moneys received by the clerk are not emoluments, in Volume 23, page 732, June 13, 1917.

The reasoning of Judge Geiger is so sound and so conclusive that reference to, or attempt to distinguish the decisions of, state courts cited by the plaintiff in error is unnecessary, and this is particularly so when the history with reference to the compensation and fees of clerks of the United States courts is taken into consideration as was done by Judge Geiger in his exhaustive opinion.

The language of the statute is that the clerk shall ac-

count for "all fees and emoluments of his office of every name and character." A *fee* is allowed to the clerk by a statute, for services performed. An *emolument* has been defined and fixed as to its outlines by the Supreme Court.

United States v. *Hill,* 120 U. S., 169.

This case has been subsequently cited, with approval, by the courts. In the Hill case the question involved was whether the clerk should include in his semi-annual return, as an emolument, the money he received to compensate him for services rendered to individuals in naturalizing them.

The service was rendered to individuals, not as clerk, but because the individual who was clerk was specially designated by the court to perform the particular service, and was, in the same way, permitted to collect the compensation for such service.

The Supreme Court quoted, with approval, and adopted as its own, the opinion of the lower court, which was in part as follows:

> "In respect to naturalization cases, it has never been hitherto understood, either by the judges or the departments, that the fees of the clerk were for services rendered in his official capacity. At times, especially before elections, these applications are extremely numerous. The papers are usually prepared by the parties themselves or their friends, or more frequently by agents of candidates. The hearings are *ex parte,* at no stated times, and it is rare that any person appears in opposition. It has, therefore, been necessary, both in the interest of the applicants, and for the due and orderly execution of the law, and to enable the court to dispose of the cases, that the paper should be looked over and corrected by some person familiar with the law and practice, and in many instances that the witnesses should be examined before the cases were presented to the

court for final action. It was for this service that the clerk has been allowed to make these charges to the parties. These are duties which the court has the undoubted right to have performed by some other persons than the presiding judge. In these cases the clerk acts rather as a person appointed to assist the court in exercising its functions, like a master or examiner in an equity cause, or an assessor in admiralty, or an auditor in a suit at law. It is the universal practice of all courts of large jurisdiction to appoint special officers, at the expense of the parties, to make inquiries, investigate details, examine papers, take accounts, make computations, and perform ministerial acts. Their reports, when returned into court and accepted, become part of the case, and form the basis of the orders and decrees of the court in the cause. • • •

It is for *services rendered* under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. *They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose; as by the district attorney, or a commissioner of the Circuit Court, or an attorney, or any suitable person not an officer of the court.*" (Italics ours.)

Afterwards, and because of this opinion, the *statute* was so amended as to specifically make the naturalization money an *emolument*—a fact which recognizes and emphasizes the accuracy of the above definition.

Applying this definition to the case here at bar, we observe that interest collected by the clerk, on litigants' money held by him on deposit, while it still remains litigants' money, and is not yet earned as fees by the clerk, or otherwise disbursed, does not fall within the definition of *emolument*, because:

(1) It is not paid to the clerk to compensate him for *service* rendered by him;

(2) If the mere depositing of this money in the bank can be said to be "*performing a service,*" and if the re-

sulting interest can be said to be "a compensation for that service," even when that service is not rendered for the compensation earned, *by the reason of his official capacity, as clerk.* Any one could perform the service, if the court designated him to do it. Mr. MacMillan could do this thing as well if he were out of office, as if in office. It is a special duty enjoined on him by the court, and no part of his official capacity; and no part of the duty of his office.

The *Hill case* seems absolutely conclusive of this question.

Originally, the clerk received fees and emoluments as his own property, and kept them all, accounting to no one. Subsequently, it was provided that of such fees and emoluments received, he should, at the end of each six months' period, render an account to the United States concerning them; that he should deduct from the total the cost of his clerk hire, office expenses, and his own fixed amount, and that the *surplus* should be paid over to the United States.

The statute which made this limitation did not change the original status and ownership of the money. Before the statute the money was that of the clerk. The statute allowed him to collect it from the litigant, if necessary, by process of law, in his own name. The statute did not change this legal status. The money remained, notwithstanding the statute, the money of the clerk in the first instance. It might *always* remain the money of the clerk. In many districts it always does remain the money of the clerk. The statute merely provided that, of the aggregate fees and emoluments received, he should pay over the surplus. When this surplus is ascertained, then the United States, for the first time, acquires some right in the surplus. Exactly what that right is, is not material

here, *but before* this surplus is ascertained the United States has no interest, whatever, in the fund. Up to that time the money is the clerk's own money. It is not *public funds.*

In the language of Justice Hughes, in the *Mason case,* 218 U. S., 531, "the amount with which the clerk is chargeable upon his accounting is not '*public money*' or '*the money or property of the United States.*' • • • The fees and emoluments *are not received* by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties." (Italics ours.)

Under this clear statement of the status of this money, the United States can claim no possible ownership in them, or in any increment earned on them *before the accounting.*

The opinion in the Mason case continues, "and with respect to the amount payable when the return is made the clerk *is not trustee, but debtor.*"

However, this last question is not before the court in this case.

And finally, the facts on the pleadings here show, that for many years, the clerk has not accounted for this interest, and has not considered the same as an emolument of his office, or as increment earned on public money. But, on the contrary, has, with the full knowledge of the court, of the treasury office, and of everyone concerned, made his returns, *exclusive* of this interest. There is no question of bad faith involved, but only the construction of a statute which has been the subject of administrative action every six months for many years.

For many years the department officers, and all concerned, have acquiesced in this practice, and thereby

placed their implied construction on this statute. We, therefore, invoke in favor of the defendants, the rule laid down in

United States v. *Hill,* 120 U. S., 169, 182,

in which the court said:

> "With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semi-annual accounts of the principal having been actually examined and adjusted at the treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment of justice, in many cases in this court, not only between man and man, but between the Government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative.
>
> In *Edwards' Lessee* v. *Darby,* 12 Wheat., 206, 210, it was said: 'In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.' To the same effect are *United States* v. *Dickson,* 15 Pet., 141, 145; *United States* v. *Gilmore,* 8 Wall., 330; *Smythe* v. *Fiske,* 23 Wall., 374, 382; *United States* v. *Moore,* 95 U. S., 760, 763; *United States* v. *Pugh,* 99 U. S., 265, 269; *Hahn* v. *United States,* 107 U. S., 402, 406; and *Five Per Cent Cases,* 110 U. S., 471, 485. In the

case of *Brown* v. *United States*, 113 U. S., 568, the same doctrine was applied, the cases in this court on the subject being collected, and it being said that a 'contemporaneous and uniform interpretation' by executive officers charged with the duty of acting under a statute 'is entitled to weight' in its construction, 'and in a case of doubt ought to turn the scale.' A still more recent case on the subject is *United States* v. *Philbrick*, *ante*, 52, where this language is used: 'A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned.' "

We submit that on this principle alone the contention of defendants in error should prevail.

III.

The basis of the Government's contention under this head is that the United States as obligee in the clerk's bond can maintain a suit against the clerk's surety for failure to account for interest collected and retained on moneys deposited by litigants subject to litigation. Such a contention must necessarily rest upon the theory that such moneys are for the time being public moneys. This contention must fail because this court has held in the Mason case, *supra*, that such moneys are not public moneys before the accounting. As to this contention of the Government, we again quote from Judge Geiger's opinion as follows:

"It will be assumed that the plaintiff seeks recovery of the interest money in its own right; that the failure to account for and pay it to the Government, is assigned as a breach by the respective clerks of an official obligation to be discharged by them to the plaintiff; that while, as seen from the statement of facts, the defendant clerks have assumed obligations toward litigants respecting the disbursement of

deposited moneys and the return to such litigants of any unexpended portion, no breach of any such obligation is assigned as a basis for institution of suit by the Government on behalf of others; in other words, the plaintiff seeks recovery of the interest moneys 'as the property of the United States.' So too, it will be assumed that if the revenues coming to the hands of the clerks are in truth public moneys, the property of the Government, then any interest earned thereon, no matter when or how, rightfully follows the principal or corpus, as an incident or increment, in no event subject to personal appropriation by the custodian of the principal.

Considering first the interest money as arising upon a fund in part constituted from deposits made by litigants to be drawn against by the clerk for payment of fees as they accrue, certainly neither the clerk nor the Government has any interest in such deposits, prior to proper appropriation for the uses intended, except to hold them. Even admitting for the time being, that the fees when actually earned and paid are then public funds, the deposit made by a litigant to secure such payment, is in no proper sense a fund in or over which the Government has obtained the slightest proprietary interest or power of disposition. That interest and right is retained by the litigant, save only as he has surrendered it to the clerk to exercise by drawing against it in the defrayal of fees as and when, under the law, they accrue and are chargeable against the litigant. While the transaction in making the deposit under the rule may not technically be a bailment, the clerk, in the nature of things, stands as a sort of insurer for the return to the litigant of the deposit or such part thereof as shall not have been earned as fees either by himself or others for whose benefit it is made. Certainly the deposit is not made for the benefit of the Government. The clerk under the law is required to account for fees earned whether they are paid or not; and the rule does not impress such deposit with the character of public moneys or revenues; but is a mere regulation for the protection of the clerk, to guaranty to him in advance, and as an administrative convenience in the discharge of his

duties of and in the payment of moneys primarily receivable by him as his compensation. As indicated, if these court rules for deposits were not in force, it would rest with the clerk to insist upon payment of each fee as it is earned, in advance. If he failed to collect, but accounted for it as earned, the loss is his. His failure actually to collect the money from the litigant, while it might so result in loss to him, would not, if he accounted for it to the Government, be a breach of any condition of his bond. So long, therefore, as the moneys deposited by the litigant retain their status as a security deposit, the Government has and can have no claim to any increment thereof by way of interest." (Rec., 38 and 39.)

In *Howard* v. *United States,* 184 U. S., 676, cited by plaintiff in error, the money was paid to the clerk in a pending litigation and belonged to the court as a part of the subject of litigation. It was held that the money could be recovered by the United States as obligee for the owner but only after demand by the owner and default by the clerk. It was not held that the money was public money or that the United States had any proprietary interest in it.

In *U. S.* v. *Abeel,* 174 Fed., 12, on which the Government places reliance, it was decided only that where the clerk embezzled litigants' funds, the *United States, as obligee* in bond and to prevent multiplicity of suits might bring suit on the clerk's bond to recover these moneys *for those who owned it.* This was a mere matter of procedure, practice and pleading and did not in any way intimate that the United States had any title or interest in the money.

In the Abeel case the clerk had failed to pay on demand and was in default. He might, therefore, be sued either by the individuals or by the United States for the individuals, but neither of them could sue him *unless* he was in default.

In *U. S.* v. *Davis,* 243 U. S., 570, 572, cited by the Government in its brief, an indictment consisting of nine counts was returned against Davis for converting moneys of persons other than the United States to his own use. The sixth count alleged that Davis was clerk of the United States District Court for the District of Hawaii. The remaining counts described him as deputy clerk of the District Court in the aforesaid district. The clerk of the District Court of the United States for the District of Hawaii was, during the time covered by the indictment, a salaried officer under a special act of Congress and his salary was appropriated and paid to him by the Government and he was not entitled to retain the same out of the fees of his office.

Justice Morrow of the Circuit Court of Appeals for the Ninth Circuit, who presided in the United States District Court for the District of Hawaii at the trial of the case, sustained a demurrer to all of the counts of the indictment. His decision, apparently, being based on the authority of *U. S.* v. *Mason,* 218 U. S., 517, the Government removed the case to this court on writ of error and among other things assigned as error that the lower court erred in holding that the principles of the "Mason" case (*U. S.* v. *Mason,* 218 U. S., 517) applied to a deputy clerk as well as to a clerk and in its brief filed in the Supreme Court expressly asked that the judgment of the lower court be affirmed as to the sixth count and reversed as to the other eight counts.

It will be noticed that this court, in reversing the judgment, confined its decision strictly to the point raised by the assignment of error. Inferentially, at least, the decision of the Supreme Court in the Davis case supports the holding of the District Court and the Court of Appeals and the contention of the defendants in error in this case, and is, we submit, an authority in favor of the

defendants in error in this case in view of the point now raised by the United States that Clerk MacMillan is a salaried officer.

The clerk of the United States District Court for the District of Hawaii was a salaried officer, but in the Davis case the Government did not contend that the Mason case, *supra*, did not apply to the sixth count of the indictment (that being the count wherein Davis was charged as clerk) and this court in its decision did not so hold. Instead of that case being an authority in favor of the plaintiff in error, we think it recognizes that the principles held in the Mason case did apply to the count where Davis was described as *clerk*, and only holds that the principles of the Mason case did not apply to the remaining counts describing him as deputy clerk.

Not one of the cases cited in the brief of plaintiff in error holds or even intimates that the disputed funds prior to accounting and prior to the establishment of a surplus were public money or that the United States has any proprietary interest in such moneys. It is, of course, true that where the money at bar is in fact public money by United States statute, then the interest follows the corpus belonging to the owner—the public—but that is not the case. Here the money by express and direct decision of the highest tribunal is not public money; hence, the many cited cases, where in each case, the money was by state statute or state judicial decision public money, have no application to the case at bar.

If the clerk embezzled or converted for his own use by failing to disburse as required by law, the funds handed him by litigants, then without doubt the United States, as obligee and only as obligee, could sue the bondsmen for such converted money, but the suit would not be for the benefit of the United States as owner or because the

United States has any interest in the money, but merely because it was obligee in bond and therefore nominal plaintiff for the benefit of the true owner. The owner of the money could not sue the clerk on his bond for *interest* on his deposited money, neither could the United States. The clerk has not contracted to pay the litigant interest and a *debtor* becomes liable for interest only by express contract or by implied contract arising from an account stated and a failure to pay the stated amount. If the owner cannot sue the clerk to recover interest on the money deposited by such litigant owner, then obviously the United States, acting merely as obligee on the bond and *wholly for the use of the owner* can have no larger right in behalf of the owner than the owner has for himself.

In the note at the bottom of page 18 of the Government's brief a suggestion is made that the plea does not answer the entire declaration. It is sufficient answer to this to say that no point of this kind was made in the court below. The Government cannot raise it now. (See *Luria* v. *U. S.*, 231 U. S., 9, 17; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S., 94, 98, 99; *West* v. *Timber Co.*, 244 U. S., 90, 100.) There is no merit in the suggestion, however, as the plea fully answered the entire declaration.

Conclusion.

The argument of the defendants in error is, therefore, summarized thus:

1. That even if all the money in question is *public money* in the hands of the clerk, for disbursement, yet the Government, before accounting and default, could not maintain action *for interest* on the fund.

2. That as to the money deposited by litigants, and

not yet disbursed, the same is, and always remains individual money. That as to this money the clerk is debtor to the litigant who deposited it. That neither such litigant nor the United States, acting for him, as obligee on the bond, could maintain an action for interest, except where the clerk had defaulted in making account for the funds when demanded.

3. That it cannot be claimed that the increment, or interest earned on litigants' individual money, not yet disbursed, is an *emolument* because it is not earned by the clerk, either as compensation or in his official capacity, as clerk.

4. That as to the money earned by the clerk as fees and emoluments, and *before* a surplus is ascertained and paid, the same is the money of the clerk, and not the property or money of the United States, and concerning it the Government has no right, title or interest.

5. That the long practice in respect to this interest matter amounts to an administrative interpretation of the statute and as against the clerks and their bondsmen, who are entirely innocent of wrongdoing, should not be reopened to their detriment.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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